APPENDIX I

ATLANTIC RICHFIELD'S PREHEARING MOTIONS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
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WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 1 REQUESTING A REGIONAL BOARD RULING THAT CERCLA PROHIBITS THE REGIONAL BOARD FROM ISSUING THE CAOs

INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") prohibits the Regional Board (the "Board") from issuing the Draft Cleanup and Abatement Orders (the "Draft CAOs") for these Sites and asserting jurisdiction over the cleanup. Because the United States Forest Service ("USFS") is already carrying out a CERCLA remedy at the Sites, CERCLA bars any other party from attempting to implement a different or additional remedy. The Board participated with the USFS in considering and selecting the CERCLA remedy and apparently has elected not to coordinate, among other things, its response activities at the Mine Site with the USFS. The regulations set forth in CERCLA's National Contingency Plan ("NCP") also provide an opportunity for the Board's participation in USFS review of the protectiveness of the USFS remedy. With the CERCLA process long since set in motion, only a federal court can authorize activities that seek to improve upon or could alter the CERCLA remedy, and even a federal court may do so only after the remedy is complete.

Atlantic Richfield Company ("Atlantic Richfield") therefore moves the Board for a ruling that CERCLA prohibits the Board from exercising jurisdiction over the Draft CAOs.

BACKGROUND

After completing a site investigation that began in 1990, USFS entered its Record of Decision ("ROD") for the Tailings Site in June 1994. (*See* Exhibit No. 145, ROD at p. 4-5.) The ROD reports that USFS and the Board "worked closely to analyze the site and develop treatment alternatives," and that the Board received copies of all relevant documents. (*Id.* at p. 4). USFS amended the ROD in August 2001. (*See* Exhibit No. 153, Amended ROD.) Under the ROD and Amended ROD, USFS has (or will) implement the following cleanup measures at the Tailings Site: reconstruct 1,300 feet of the upper Dolly Creek Channel; construct a passive wetland treatment system (*i.e.*, aerobic wetland) in the lower portion of Dolly Creek; install wind fences on 50 acres of the tailings; re-vegetate on and around the tailings; and, divert Dolly Creek around the tailings to ensure effectiveness of the passive wetland treatment system.

Of course, Little Dolly Creek also flows past the Mine Site, less than a mile upstream from the Tailings Site. Board staff considers the Mine Site to be separate from the Tailings Site solely due to the Mine Site having been privately owned. (*See* Prosecution Team Opening Brief ("Pros. Op. Br.") at p. 1 ("The site requires two CAOs because the Mine is privately-owned while the Tailings are on [USFS] land.").) Historically, the Walker Mining Company (and potentially other operators that followed) utilized both Sites as part of a single mining operation. In addition to being less than a mile apart along the same creek, the Sites also are part of the same hydrogeological system. Accordingly, "[a]ttainment of water-quality objectives for Dolly Creek and other surface waters requires coordination of upstream and downstream response actions." (Lombardi, at p. 22.)

ARGUMENT

I. CERCLA § 113 Bars the Prosecution Team's Effort to Impose the CAOs for the Sites.

CERCLA § 113(b) vests "exclusive original jurisdiction over all controversies arising under [CERCLA]" with the federal district courts. 42 U.S.C. § 9613(b). State courts and other state tribunals (*e.g.*, the Board) do not have jurisdiction over such claims. *See ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000). Section 113(b)'s "arising under" clause is "coextensive" with CERCLA Section 113(h)'s timing of review bar and thus both provisions bar "any 'challenge' to a CERCLA cleanup," until the cleanup is complete, and then an action is permitted only in federal court. *Fort Ord Toxics Project, Inc. v. Cal. Envtl. Prot. Agency*, 189 F.3d 828, 832 (9th Cir. 1999). The Prosecution Team conceded that this is the correct reading of CERCLA Sections 113(b) and (h), leaving the only question as whether the Draft CAOs "challenge" the ongoing CERCLA cleanup at the Tailings Site. (*See* Prosecution Team Opening Brief at p. 10-11 ("Pros. Op. Br.").)

A claim challenges a CERCLA cleanup if the claim "seeks to improve on the CERCLA cleanup" or "interfere[s] with the remedial actions selected." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011). Examples include claims or lawsuits "where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to terminate the RI/FS and alter the method and order of cleanup." *ARCO Envtl.*, 213 F.3d at 1115 (internal citations omitted). If the relief requested could impact the response action that the federal government has selected or will select, then it "challenges" the CERCLA cleanup. *McClellan*, 47 F.3d at 329-30; *see also Razore v. Tualip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). A claim seeking to improve upon or alter the CERCLA remedy is a challenge regardless of whether the claim is brought under federal or state law. *See ARCO Envtl.*, 213 F.3d at 1115; *Fort Ord*, 189 F.3d at 832. "Congress concluded that the need for [remedial] action was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in process. *See McClellan*, 47 F.3d at 329.

A. The Tailings CAO is a "Challenge" to the CERCLA Cleanup at the Sites.

The CERCLA process for the Tailings Site began many years ago and, as the Board acknowledges, continues today. (Pros. Op. Br. at p. 7 (stating that "the remedial action remains open").) The Board "worked closely" with USFS in investigating the Tailings Site and selecting the remedy there, even securing USFS's agreement to include a 1968 State Board resolution and 1991 WDRs as part of the Applicable or Relevant and Appropriate Requirements identified in USFS's ROD. (Exhibit No. 145 at p. 8, ROD.) Yet, the Prosecution Team's Draft CAO for the Tailings Site would require

Atlantic Richfield to first conduct investigatory activities on the Tailings Site and, later, to "remediate the site in such a way to prevent future releases of mining waste." (*See* Draft CAO No. R5-2014-XXXX at p. 8-10.) The Draft CAO contains thirteen separate paragraphs impermissibly "dictat[ing] specific remedial actions" Atlantic Richfield would be compelled to perform if the CAO is issued. *ARCO Envtl.*, 213 F.3d at 1115. The Draft CAO further states that, pursuant to Board policy, the Prosecution Team seeks to obtain cleanup to "background" quality, clearly an attempt "to improve on the CERCLA cleanup." *McClellan*, 47 F.3d at 330. It is hard to imagine a more direct challenge to the USFS's CERCLA remedy.

B. The Mine CAO is a "Challenge" to the CERCLA Cleanup at the Sites.

The Prosecution Team's Draft CAO for the Mine Site is no less a challenge to the USFS remedy. If enacted, the Draft CAO for the Mine Site would require Atlantic Richfield to "clean up and abate the discharge of all mining waste and restore the affected water to background conditions." (Draft CAO No. R5-2014-YYYY at p. 11.) Because the Mine Site and Tailings Site—which operated as one site and are located less than a mile apart—are essentially a single site and are hydrogeologically intertwined, any remedial activities aimed at restoring water quality upstream at the Mine Site will impact the CERCLA cleanup being carried out at the Tailings Site. Water quality issues at the Mine Site and Tailings Site are interrelated and an integrated remedial approach that addresses source contribution from all areas (mine workings, mill site and tailings impoundment area) makes sense to avoid unintended consequences that could arise from failing to coordinate such actions. "Changes in surface water or groundwater systems in the mine and mill area will affect conditions in the lower tailings impoundment area, regardless of administrative boundaries." (Lombardi, at p. 22.) Thus, the Draft CAO for the Mine Site also "challenges" the USFS's cleanup because it would "interfere with the remedial actions selected." *McClellan*, 47 F.3d at 330.

C. The Prosecution Team is Incorrect in Asserting the Board Has Jurisdiction to Enter the CAOs.

In arguing that the CAOs do not constitute a "challenge" to the CERCLA cleanup at the Sites, the Prosecution Team relies primarily on CERCLA's so-called savings clauses, 42 U.S.C. §§ 9614, 9652, & 9620, and the case *United States v. Colorado*, 990 F.2d 1565 (10th Cir.1993). (*See* Pros. Op. Br. at p. 6-9.) The Prosecution Team is incorrect that these authorities give the Board jurisdiction to enact the Draft CAOs.

CERCLA itself states that none of its savings clauses affects the operation of section 113(h): "[CERCLA] does not affect or otherwise impair the rights of any person[1] under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title . . .*" 42 U.S.C. § 9659(h) (emphasis added). Thus, Congress contemplated and rejected the Prosecution Team's argument that CERCLA's general savings clauses restrict the operation of Section 113(h). *See*

[1] The term "person" includes a "State." 42 U.S.C. § 9601(21).

Anacostia Riverkeeper v. Wash. Gas Light Co., 892 F. Supp. 2d 161, 171 (D.D.C. 2012) (rejecting argument that CERCLA's savings clause affects the operation of Section 113(h) because Section 159(h) "makes the primacy of CERCLA § 113(h) explicit"); *see also Razore*, 66 F.3d at 240. CERCLA does not "save" the Prosecution Team's challenge to the USFS remedy.

The Prosecution Team's reliance on *United States v. Colorado* also is misplaced. The Tenth Circuit left no doubt that, "the language of § 9613(h) does not differentiate between challenges by private responsible parties and challenges by a state." There, as here, the question was limited to whether the State's attempt to enforce state environmental laws did, in fact, "challenge" the CERCLA remedy. *Id.* at 1575-80. In *Colorado*, however, the State sought merely to ensure that the federal government conducted its cleanup at the hazardous waste site in accordance with the State's hazardous waste laws. *Id.* at 1568-69. There was no evidence that application of the hazardous waste laws could interfere with or delay the ongoing cleanup. *Id.* at 1576. Here, by contrast, the Prosecution Team seeks an order that would require a third party, Atlantic Richfield, to enter onto federal property where a federally-approved remedy is in process, all because the State is not satisfied with the USFS cleanup and believes it can be improved. The Draft CAOs are squarely within the actions CERCLA Section 113(h) prohibits and *United States v. Colorado* makes no provision to the contrary.

CONCLUSION

Because CERCLA affirmatively bars the type of "challenge" to remedial action that is embodied in the Draft CAOs, Atlantic Richfield respectfully requests a ruling from the Board that, as a matter of law, CERCLA prohibits the Board from exercising jurisdiction. Accordingly, the Draft CAOs must be withdrawn and this matter dismissed.

Dated this 20th day of February, 2014.

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ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 2 REQUESTING A REGIONAL BOARD RULING THAT THE REGIONAL BOARD IS A DISCHARGER AT THE SITES

INTRODUCTION

The Regional Board (the "Board") is liable for conditions at the Sites and any Cleanup and Abatement Order ("CAO") must include the Board as a Discharger. The Board's liability stems from two sources: (1) The Board's settlements with former Mine Site owners wherein the Board held the former owners harmless and assumed the former owners' liability; and (2) The Board's remedial efforts at the Mine Site which are incomplete and may not be beneficial in the long-term. Indeed, the Board's staff has admitted the Board's liability in internal Board documents. In addition – and contrary to the Prosecution Team's representations in its Opening Brief – there are multiple other parties who continue to bear liability for conditions at the Sites.

Atlantic Richfield Company ("Atlantic Richfield") therefore moves the Board for a ruling that the Board itself is a Discharger at the Sites[1]. Accordingly, the Mine Site Draft CAO and the Tailings Site Draft CAO must each be withdrawn, or revised to include the Board as a Discharger.

BACKGROUND

Since the Walker Mining Company's bankruptcy in 1945, numerous individuals and entities have owned or operated the Mine Site. In 1991, the Board settled with then-owners Robert Barry ("Barry"), Calicopia Corporation ("Calicopia"), and several other affiliated individuals. The Prosecution Team describes the 1991 settlement as an agreement by the Board to hold Barry, Calicopia, and all the other settling parties harmless. (*See* Revised Draft CAO No. R5-2014-YYYY at ¶ 28.) Pursuant to their settlement agreement, these parties paid the Board $1.5 million and obtained a complete release of all liability associated with the Mine Site, including a release of the lien the Board had placed on the property.

In 1999, the Board reached a similar agreement with Cedar Point Properties ("CPP") and its principal, Daniel Kennedy ("Kennedy").[2] Here again, the Prosecution Team's Draft CAO provides that the Board agreed to hold Kennedy harmless and completely released Kennedy for any liability related to the Mine Site. (*See* Revised Draft CAO No. R5-2014-YYYY at ¶ 29.) In exchange, CPP and Kennedy paid to the Board the proceeds of a timber harvest on the Mine Site. Before settling with CPP and Kennedy, the Board placed a lien on the Mine Site property for $238,334, which appears to be the costs associated with Board work completed up to that time that had not been paid for by the $1.5 million settlement with Barry and Calicopia. (*See* Exhibit No. 147 at p. 4.) CPP's timber harvest ultimately netted sufficient funds to pay off the lien plus an additional $102,307.60. (*See* Exhibit No. 154, at p. 2.) In 1997, however, the Board had requested and received $1.2 million in state Abatement Account funds

[1] Other parties too, who currently are not included in these proceedings, potentially are Dischargers. *See infra* at Argument Section III for a discussion of documents identifying these additional potential liable parties.

[2] In addition to being CPP's principal, Kennedy appears to have owned the Mine Site in his personal capacity for some period of time before transferring it to CPP.

for work at the Mine Site, (*see* Exhibit No. 146, p. 1), yet the Board apparently made no effort to recover those funds from CPP or Kennedy before releasing and holding Kennedy harmless.

Of course, the remedial work funded by these settlements is work the Board itself has conducted at the Mine Site. Beginning in at least 1984, the Board has worked with various contractors to study the Mine Site, install the adit plug, perform maintenance on the tunnel, install surface water diversion features, and install a monitoring well. (*See* AMEC Rpt. at pp. 19-21.)

Nor is the Board the only party to own or operate the Mine Site since the Walker Mining Company's bankruptcy. Besides CPP, Kennedy, Barry, and Calicopia, the historical and administrative records indicate that multiple other parties owned the Mine Site or operated there. Some of these parties appear to remain viable. For instance, a 1986 memo indicates that several large mining companies conducted operations at Walker Mine, among them Noranda Exploration, AMAX, Conoco, and Standard Bullion Company. (Exhibit No. 142.)[3] Yet, no other documents from the Board's productions of documents indicate that the Board ever investigated what operations any of those companies conducted or whether those entities appear to still be viable.

ARGUMENT

I. The Board Assumed Liability Through Settlements With Former Site Owners.

By settling with former owners and operators of the Mine Site, the Board assumed liability for the Mine Site. Under California law, a hold harmless agreement is "[a] contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility." *Cal. Sch. Boards Assn. v. State Bd. of Educ.*, 191 Cal. App. 4th 530, 568 (Cal. Ct. App. 2010). As the Prosecution Team states in the Draft CAOs, its settlements with Barry, Calicopia, Kennedy, and CPP include agreements by the Board to hold the settling parties harmless from further liability related to the Mine Site. Thus, the Board effectively stepped into the settling parties' shoes for purposes of addressing any additional liability related to the Mine Site.

Water Code Section 13305 confirms the Board's assumption of liability under the settlement agreements. Section 13305 imposes a mandatory obligation on the Board to abate conditions at any "nonoperating industrial or business location." Cal. Water Code § 13305(a). Section 13305 then gives the Board authority to impose a lien against the property for the reasonable costs of its abatement efforts. *Id.* § 13305(f). In pursuing its settlement with Barry, Calicopia, and others, the Board exercised its authority under Section 13305 with the approval of the State Board. (*See* Exhibit No. 143, Release of Lien; Prosecution Team Opening Brief ("Pros. Op. Br.") at p. 2 (explaining that the Board "decided to seal the 700 level mine portal under authority of Water Code section 13305."). The Board later released its lien for recovery of its costs for abatement from

[3] This letter was located among documents the Board produced to Atlantic Richfield.

Barry, Calicopia and the other settling parties. To the extent the remedy the Board selected is, in hind sight, insufficient, incomplete, or temporary at best, the Board elected to bear that risk too when it relinquished its lien. And to the extent the Board misjudged the true amount of costs necessary to abate the Mine Site and maintain the remedy it selected and installed pursuant to Section 13305, the Board bears that liability itself.

The Board's settlement with CPP and Kennedy after exercising authority pursuant to Water Code Section 13304 has the same effect. Section 13304 gives the Board the option to conduct abatement efforts itself where the property owner is unwilling to do so and, like Section 13305, also gives the Board the authority to impose a lien for the reasonable costs of its cleanup. Cal. Water Code § 13304(b)(1)-(2), (c)(2). The Board elected to impose a lien against CPP's property for only $238,334 – and to enter a settlement agreement releasing Kennedy upon satisfaction of *half* that lien amount – despite having just requested and received $1.2 million from the State Abatement Account for remedial activities at Walker Mine. The Board's election to release the property owner without obtaining full satisfaction of the amounts owed to it cannot create liability for Atlantic Richfield. To the contrary, the Board alone is liable for amounts it expended during CPP's ownership of the property but elected not to recover from CPP or Kennedy.

II. The Board Is Liable For Its Failed Remedial Efforts.

The Board has conducted remedial activities on the Mine Site since at least 1984 and must bear any liability for maintaining or fixing the remedies the Board installed. The Board previously has been found liable at another mining site under very similar circumstances. In *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, the U.S. Court of Appeals for the Ninth Circuit affirmed a trial court decision holding the Board liable under the Clean Water Act for remedial actions it took at the Penn Mine, 13 F.3d 305, 310 (9th Cir. 1993); *see also* Regional Board Resolution R5-2013-0053 ("The Central Valley Water Board and EBMUD were subsequently found jointly responsible under the Clean Water Act for the acid mine drainage due to their operation of the remediation project."). At Penn Mine, as here, the Board had constructed remedial facilities designed to capture acidic runoff from a historical mining operation, but the Board's facility sometimes allowed the runoff to flow into local waterways. 13 F.3d at 306-07. The Ninth Circuit rejected the Board's arguments that the releases from its remedial facilities did not count as discharges under the Clean Water Act, *id.* at 308-09, as well as the Board's claim that it was immune from suit, *id.* at 309-10. So too here, the Board will be unable to avoid liability for its failed or insufficient remediation of Walker Mine.

In addition to being liable under the Clean Water Act, the Board also is liable under CERCLA and California's analogous provisions in the Health & Safety Code. The U.S. District Court for the Eastern District of California considered similar circumstances in *United States v. Iron Mountain Mines*. 881 F. Supp. 1432 (E.D. Cal. 1995). The court in *Iron Mountain* agreed with the defendant that the State of California (through the Board and the State Board) could be liable as an operator for participating in the

operation of dams that allegedly contributed to environmental harm connected to a historical mining area. *Id.* at 1452. In so holding, the court rejected the State's argument that it was entitled to some kind of immunity because it had acted only in a remedial capacity and pursuant to regulatory authority. *Id.* at 1445-49. The case for operator liability here would be even stronger because the Board, by itself, has conducted several remedial operations on the Mine Site and continues to operate those facilities today. California's Health & Safety Code imposes liability in the same circumstances as does CERCLA, Cal. Health & Safety Code § 25323.5 (defining "responsible party" and "liable person" by reference to CERCLA), so the Board is liable under both federal and state law for these same remedial activities.

Multiple Board staff members have identified the Board's increasing liability for its remedial actions as a reason for now pursuing Atlantic Richfield. In July 2011, Jeff Huggins wrote that "the [Board] has incurred considerable obligations for long term operations and maintenance of the mine seal. This is expensive and the liabilities are not insignificant. If the [Board] is to reduce its liabilities for Walker Mine, it must determine if a responsible party exists." (Exhibit No. 158 (emphasis in original).) To similar effect, in April 2013, Victor Izzo ended a memo by saying "Please bear in mind that the [Board] potentially is a responsible party for the mine seal and remedial actions that currently exist at the site and the sooner we bring [Atlantic Richfield] in as a RP the sooner we are relieved of that responsibility." (Exhibit No. 159 (emphasis added).[4]) Notwithstanding the Board's apparent belief that Atlantic Richfield can absolve the Board of liability the Board itself assumed, the Board's own analysis admits that the Board has significant liability for its own activities at the Mine Site.

III. Multiple Other Parties Have Contributed To Conditions At The Sites.

The Prosecution Team stated in its Opening Brief that Atlantic Richfield is "the sole remaining viable responsible party." (Pros. Op. Br. at p. 3.) Based on the Board's own records, however, that does not appear to be the case. In addition to the Board itself, multiple Board documents refer to entities that operated at the Mine Site, with the Board's knowledge, during Calicopia's tenure as the Site owner. A 1986 memo in the Board files lists the various entities that conducted these operations, including Noranda Exploration, AMAX, Inc., Conoco (now known as ConocoPhillips Company), and Standard Bullion Corporation, Inc. (Exhibit No. 142, at pp. 2-3.) Another document from the Board's files gives additional details about these entities' involvement at the Mine Site, indicating that several of these entities actively undertook both mining related work and remedial work on the Mine Site. (*See, e.g.*, Exhibit No. 141, at p. 6 (describing AMAX as "the operator" and describing its reconstruction of a tunnel, as well as cleaning out of "a major cave-in").) Through the Board's settlement and assumption

[4] The referenced record was produced with other materials by the Regional Board in response to a CA Public Records Act Request served by Atlantic Richfield. The Prosecution Team later produced a privilege log through which the Prosecution claims this record is protected from disclosure, citing Deliberative Process (Cal. Gov. Code 6255); Active Litigation (Cal. Gov. Code 6254, subd. (b)); and attorney client and attorney work product privileges. Atlantic Richfield disagrees with the Prosecution's privilege claims, and the parties agreed to seek a ruling from the Advisory Board whether the subject record is privileged under one or all of the grounds asserted by the Prosecution.

of the liabilities of Barry and Calicopia, the Board arguably has also assumed liability for the actions of others who operated on the Mine Site during the same timeframes.

CONCLUSION

Given the Board's own liability for further response actions at the Sites, Atlantic Richfield respectfully requests that the Board rule, as a matter of law, that the Board itself is a liable party for conditions at the Sites. Accordingly, the Mine Site Draft CAO and the Tailings Site Draft CAO must be withdrawn, or revised to include the Board as a Discharger.

Dated this 20th day of February, 2014.

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ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 3 REQUESTING A REGIONAL BOARD RULING THAT THE DOCTRINE OF LACHES PRECLUDES THE BOARD FROM ISSUING THE DRAFT CAOs

INTRODUCTION

The Regional Board (the "Board") has been investigating the Walker Mine and Tailings Sites since 1958. At that time, it was common knowledge that International Smelting &Refining Company ("IS&R") had been an investor in the Walker Mining Company, the company that initially owned and operated the mine. Many individuals with first-hand knowledge of Walker Mining Company's operations were likely available at that time. Thirty years later, in 1987, Atlantic Richfield Company's predecessor donated its geological records to the University of Wyoming and thus made public the details of its relationship with the Walker Mining Company. Almost sixty years after the mine closed in 1941, the Board elected in 1999 to pursue Atlantic Richfield Company ("Atlantic Richfield") as a Discharger at the Walker Mine. But when Atlantic Richfield objected, for many of the same reasons now raised as defenses to the Draft Cleanup and Abatement Orders ("Draft CAOs"), the Board sent Atlantic Richfield a letter acquiescing to Atlantic Richfield's objections and removing Atlantic Richfield from the list of Dischargers. At least some individuals with knowledge of the facts were living in 1999. Now, fifteen years later and following inadequate settlements with the Mine Site's former owners, the Prosecution Team attempts to retread the same ground by looking to an incomplete documentary record as the sole evidence for imposing liability on Atlantic Richfield. In sum, there are no witnesses available to explain the documentary evidence on which the Prosecution Team relies or, more importantly, to provide evidence on mine operations that are not described in the geological records.

In light of the Prosecution Team's failure to timely prosecute this matter, Atlantic Richfield moves the Board for a ruling that the doctrine of laches precludes the Board from issuing the Draft CAOs.

BACKGROUND

The Walker Mining Company closed the mine in 1941. At that time, all of the documentary evidence of Atlantic Richfield's predecessors' relationship with the Walker Mining Company had already been generated and most witnesses with knowledge of the relationship presumably were still living. In 1945, when the Walker Mining Company's records were more readily available to the parties, the federal bankruptcy court held an eight-day hearing to consider the relationship between IS&R and the Walker Mining Company. (*See* Exhibit No. 132.) Based upon the testimony and documentary evidence presented, federal Judge Jackson concluded that Walker Mining Company "is not and has never at any time been an alter ego or instrument or department of Anaconda Copper Mining Company or of [IS&R]." (Exhibit No. 131.)[1]

The Board has waited 55 years from its first investigation of the sites until today to bring an enforcement action against Atlantic Richfield. Because the Board failed to

[1] *See also id.* at ¶ 4 ("[Walker Mining Company's] business and affairs have at all times been carried on and conducted in the manner and according to the methods and practice usually employed by corporations free of any domination or control by others.")

prosecute its case for 55 years, few (if any) individuals with first-hand knowledge of facts regarding mine operations are available. Moreover, IS&R's status as a shareholder of the Walker Mining company was a matter of public record as early as 1918 when the Anaconda Copper Mining Company reported IS&R's investment to Anaconda shareholders. (*See* Exhibit No. 7.) As the Prosecution Team itself acknowledges, the Anaconda / IS&R / Walker Mining Company geological records and related correspondence upon which the Prosecution Team relies have been publicly available since 1987. (Draft CAO No. R5-2014-YYYY at ¶ 35.) According to the Board's own documents, the Board reviewed this collection, at the latest, in the 1990s.[2] And the United States Forest Service's ("USFS") Record of Decision for the Tailings Site, entered in 1994, states that the Board "worked closely" with USFS to investigate the Site and then goes on to say that USFS identified Atlantic Richfield as potentially liable for the Site and shared all "relevant documents" with the Board. (Exhibit No. 145, Record of Decision at p. 4.)

During that same timeframe the Board began pursuing Atlantic Richfield. In letters dated August 13, 1997 and June 15, 1998 (Exhibit Nos. 144 and 148), the Board sought to negotiate an agreement with Atlantic Richfield "for past and future environmental remediation activities at the Walker Mine." (Exhibit No. 148.) On December 1, 1999, the Board issued a Notice of Tentative Order that would have named Atlantic Richfield as a Discharger at the Mine Site. (Exhibit No. 149.) The Notice stated that "[h]istorical records show that [Atlantic Richfield], as the successor of several companies that owned and operated the mine, is a responsible party of the Walker Mine." (Exhibit No. 150 at p. 1.) Counsel for Atlantic Richfield provided comments on this Notice via a letter dated December 30, 1999. (Exhibit No. 151.) In the letter, Atlantic Richfield identified the lack of proof that Atlantic Richfield bore any liability for the Sites, as well as the significant legal hurdles that the Board would face in attempting to name Atlantic Richfield as a Discharger at the Site. (*Id.* at 2-7.) Atlantic Richfield specifically noted that, as of 1999, "[v]arious legal doctrines, such as laches [and] equitable estoppel . . . would preclude Regional Board action against [Atlantic Richfield] based on circumstances known for decades . . . ." (*Id.* at 7.) In response to Atlantic Richfield's objections, on January 24, 2000, the Board sent a letter to counsel for Atlantic Richfield in which the Board stated: "In response to your comments, we have removed [Atlantic Richfield] from the tentative WDRs." (Exhibit No. 152.)

Even since 1999, evidence from those with first-hand knowledge of facts related to mine operations has been lost. Exhibit 135 contains notes of interviews conducted with several former residents at the Walker Mine, including Marcie Nielsen, Gilbert Lumen, and Luis Richards. (*See* Exhibit No. 135.) Nielsen, Lumen, and Richards were alive in 1999 and could have provided testimony about Walker Mining Company's

[2] In an internal Board memorandum dated July 2011, staff member Jeff Huggins stated that "[i]f the Central Valley Water Board is to reduce its liability for Walker Mine, it must determine if a responsible party exists." (Exhibit 158 at 1 (emphasis in original).) To that end, Huggins noted that IS&R owned "slightly more than a 50% stock interest in WMC," and that IS&R was a subsidiary of Anaconda, Atlantic Richfield's predecessor. (*Id.*) Huggins noted that "[a] previous search of the Anaconda Geological Documents Collection by Central Valley Water Board staff in the late 1990's provided information that links the operations of WMC to Anaconda." (*Id.* at 2.)

operations, but all are now deceased—Nielsen in 2005, Lumen in 2008, and Richards in 2001. (*See* Declaration of Andrea Hamilton at ¶¶ 5-8.) Atlantic Richfield is aware of no person still living who could provide first-hand testimony concerning Walker Mining Company operations, including IS&R's role (if any) in pollution-causing activities at Walker Mine.

ARGUMENT

Under California Civil Code § 3527, "[t]he law helps the vigilant, before those who sleep on their rights." This is the equitable defense of laches. *See Hamud v. Hawthorne*, 338 P.2d 387, 391-92 (Cal. 1959). Laches has two components: "*[U]nreasonable delay* plus either *acquiescence* in the act about which plaintiff complains or *prejudice* to the defendant resulting from the delay." *Conti v. Bd. of Civil Service Comm'rs*, 461 P.2d 617, 622 (Cal. 1969) (emphasis added); *see also Johnson v. City of Loma Linda*, 5 P.3d 874, 878 (Cal. 2000). When paired with unreasonable delay, *either* acquiescence or prejudice is sufficient grounds to invoke laches. *See In re Estate of Kampen*, 135 Cal. Rptr. 3d 410, 432 (Cal. Ct. App. 2011) ("Acquiescence, without a finding of prejudice, is sufficient for the court to apply the equitable defense of laches."). Laches is equally available as a defense to a state agency's claim as it is to any other plaintiff's claim. *Brown v. State Personnel Bd.*, 166 Cal. App. 3d 1151, 1163 (Cal. App. 1985); *City of Los Angeles v. County of Los Angeles*, 9 Cal. 2d 624, 630 (Cal. 1937). Here, along with unreasonable delay, Atlantic Richfield can establish *both* prejudice and acquiescence. Laches therefore bars the CAOs.

Unreasonable Delay. As described above, the documents upon which the Prosecution Team relies were available by 1987, and the salient facts were available still earlier than that. Importantly, witnesses with knowledge of Walker Mining Company management and its operations were available. The Board considered and analyzed its case against Atlantic Richfield at the very latest in 1997, when it first threatened to name Atlantic Richfield as a Discharger at the Mine Site. (Exhibit No. 144.) The 2011 Board memorandum noted above indicates that investigative efforts by "Board staff in the late 1990's provided information that links the operations of [Walker Mining Company] to Anaconda." (Exhibit No. 158 at p. 2.) Moreover, the same memorandum notes that IS&R was a substantial stockholder in Walker Mining Company from 1916 until 1941. (*Id.*)[3]

Yet for all that time, the Board did not pursue enforcement action against Atlantic Richfield for environmental conditions at the Walker Mine. The Prosecution Team claims that it more fully investigated the available records more recently. (Draft CAO R5-2014-YYYY at ¶ 35 ("[Board] staff recently obtained and reviewed relevant documents from the database and other sources.").) But the Prosecution Team does not claim, and could not claim, that these records were unavailable or unknown to it. The Prosecution Team does not identify what, if any, "new" information has been obtained. Nor does the Prosecution Team appear to consider what evidence has been

[3] The 2011 Memorandum is factually incorrect; IS&R acquired its shares of Walker Mining Company in October 1918. (*See* Haegele, at p. 4.)

lost through the passage of time. A lack of reasonable diligence does not excuse laches. *Hecht v. Slaney*, 72 Cal. 363, 367 (1887) ("[A] party is presumed to know whatever he might with reasonable diligence have discovered; and when the fundamental facts upon which the alleged fraud rests, are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches."); *see also Whitman v. Walt Disney Prods., Inc.*, 148 F. Supp. 37, 39 (S.D. Cal. 1957) ("[D]iligence must be observed to escape a charge of laches.").

The Prosecution Team can offer no justification for its unreasonable delay. California courts have found unreasonable delays based on much shorter periods of time than the decades at issue here. *See, e.g., Vernon Fire Fighters Ass'n v. City of Vernon*, 223 Cal. Rptr. 871, 882 (Cal. Ct. App. 1986) ("A delay of over five years between the discharge of petitioners and the hearing in this case is unreasonable."); *Kampen*, 135 Cal. Rptr. 3d at 432 ("This delay of more than 10 years was clearly unreasonable."); *Piscioneri v. City of Ontario*, 116 Cal. Rptr. 2d 38, 46 (Cal. Ct. App. 2002) (noting that an "extreme delay" of 12 years "could easily support an ultimate finding of laches" on remand); *Brown v. State Personnel Bd.*, 213 Cal. Rptr. 53, 59 (Cal. Ct. App. 1985) ("[U]nless excused, a delay in the initiation of disciplinary proceedings for more than three years is unreasonable as a matter of law.").

Acquiescence. Once unreasonable delay has been established, laches may be invoked by demonstrating that the complaining party (here, the Board) acquiesced to the actions complained of. In the laches context, acquiescence is "a resting satisfied with[,] or submission to an existing state of things." *Lux v. Haggin*, 69 Cal. 255, 270 (Cal. 1886); *see also* Merriam Webster Online (defining acquiesce as "to accept, agree, or allow something to happen by staying silent or by not arguing"). Here, when the Board chose not to investigate Atlantic Richfield or its predecessors for the first thirty-five years it investigated the Mine Site, it acquiesced in Atlantic Richfield's position that it is not a Discharger. When the Board chose to take remedial actions at the Mine Site, without consulting or involving Atlantic Richfield, the Board acquiesced to the conclusion that Atlantic Richfield is not a Discharger. Certainly, when the Board chose not to pursue Atlantic Richfield alongside the Site owners in 1991 and 1997,[4] it acquiesced in the conclusion that Atlantic Richfield was not a Discharger. And most definitely, when the Board affirmatively said that it would *not* name Atlantic Richfield as a Discharger in 1999, the Board acquiesced to Atlantic Richfield's stated position that it is not a Discharger. In the words of Patrick Morris of the Board, "In response to your [Atlantic Richfield's] comments, we have removed [Atlantic Richfield] from the tentative WDRs." (Exhibit No. 152.) Laches prohibits the Board from now coming back to Atlantic Richfield complaining of circumstances to which it has already acquiesced.

Prejudice. Though the Board's acquiescence to Atlantic Richfield's position several times between 1958 and 2000 is sufficient (along with unreasonable delay) to invoke laches under California law, Atlantic Richfield can also demonstrate prejudice due to the Board's decades-long delay. Had the Board named IS&R and Anaconda as

[4] The Board's pursuit of, and settlement with, owners of the site are detailed in Atlantic Richfield's Prehearing Motion No. 2.

Dischargers at Walker Mine when it initially investigated the site in 1958, or after Atlantic Richfield donated Anaconda's records to the University of Wyoming in 1987, or when it prosecuted Robert Barry and the Calicopia Corporation in 1991, or even when it determined *not* to issue its Tentative Order for the Mine Site in 1999, more evidence would have been available to Atlantic Richfield, including witnesses with knowledge of mine operations, Walker Mining Company management practices and perhaps even the Walker Mining Company's own documents.[5] At a minimum, the witnesses identified above whose interview statements are contained in Exhibit No. 135—Nielsen, Luman, and Richards—could have been questioned concerning the involvement of Atlantic Richfield's predecessors, and likely numerous other then-living individuals could have provided information as well. However, all potential witnesses, to the best of Atlantic Richfield's knowledge, now appear to be deceased. And all three of the witnesses identified in the interview notes passed away *after* the Board's abortive attempt to name Atlantic Richfield as a discharger in 1999. (*See* Hamilton Declaration at ¶¶ 5-8.) Thus Atlantic Richfield is prejudiced not only generally by the passage of many decades since the mine was in operation, but specifically by the Board's decision to forego naming Atlantic Richfield in 1999/2000, only to reverse that decision now.

In sum, due to the combination of unreasonable delay, acquiescence, and prejudice here, the doctrine of laches bars the CAOs. The fact that this is an environmental case does not change the analysis. The remediation at Walker Mine will continue regardless of the outcome of this case, (*see* Exhibit No. 156, State Board order approving additional funding through 2015), and as described more fully in Atlantic Richfield's Prehearing Motions Nos. 2 and 5, the Board itself has legal responsibility for these Sites and there are other forums with jurisdiction to hear the Prosecution Team's claims.

CONCLUSION

For the foregoing reasons, Atlantic Richfield requests a ruling from the Board that, as a matter of law, the doctrine of laches requires that the Draft CAOs be withdrawn and this matter dismissed.

[5] The lack of Walker Mining Company records greatly prejudices Atlantic Richfield because it means that the only documents available will necessarily emphasize the limited scope of Walker Mine's operations in which IS&R and Anaconda had involvement without shedding any light on the numerous other aspects of the Walker Mine's operations in which IS&R and Anaconda were never consulted. (McNulty Report at pp. 13-14.)

Dated this 20th day of February, 2014.

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DECLARATION OF ANDREA HAMILTON

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

I, Andrea Hamilton, declare as follows:

1. I am the Library and Information Resources Manager for Davis Graham & Stubbs LLP. I have held this position since August 16, 2012 when I was promoted from a position as Research/Reference Librarian for Davis Graham & Stubbs LLP. I hold a Master's degree in Library and Information Science.

2. In my work as the Library and Information Resources Manager for Davis Graham & Stubbs LLP, I regularly use electronic databases to search for information about whether a particular individual is living or deceased and, if living, what past and current addresses are associated with that individual. In making such searches, I use the individual's name combined with any other identifying information, such as a location where the individual was presumed to be living during a particular time period.

3. On February 7, 2014, I searched the LexisNexis Comprehensive Person Report database for information related to the individuals mentioned in paragraphs 4 through 8 below. I included as an additional criteria to my search that the individual lived in California at any point during their life.

4. Elaine P. Mills: My search results located an Elaine P. Mills with address records in Plumas County, California. Based on these records, Ms. Mills appears to still be living.

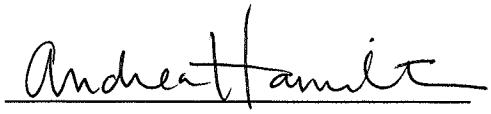
5. Marcile A. Nielsen: My search results located a Marcile A. Nielsen with address records in Plumas County, California. Based on these records, Ms. Nielsen is deceased as of April 23, 2005.

6. Gilbert W. Luman: My search results located a Gilbert W. Luman with address records in Plumas County, California and Deer Lodge County, Montana. Based on these records, Mr. Luman is deceased as of July 22, 2008.

7. Roy A. Harrison: My search results located a Roy A. Harrison with address records in Plumas County, California. Based on these records, Mr. Harrison is deceased as of September 15, 1988.

8. Louis S. Richards: My search results located a Louis S. Richards with address records in Plumas County, California. Based on these records, Mr. Richards is deceased as of November 27, 2001.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 20th day of February, 2014 at Denver, Colorado.



Andrea Hamilton

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 4 REQUESTING A REGIONAL BOARD RULING THAT DUE PROCESS REQUIRES THE BOARD TO RECUSE ITSELF

INTRODUCTION

The Hearing Procedures the Regional Board (the "Board") adopted are constitutionally inadequate for considering the contemplated Cleanup and Abatement Orders ("CAOs") against Atlantic Richfield Company ("Atlantic Richfield"). The result the Prosecution Team seeks to achieve – wholly shifting the Board's liability for the Sites by ordering Atlantic Richfield, a former shareholder of Walker Mining Company, which itself owned and operated the mine, to remediate environmental conditions on hundreds of acres of forest – would be the subject of a years-long proceeding and days or weeks of trial if pursued in a court. Yet the Board has given Atlantic Richfield only 45 minutes of hearing time and a few months to prepare and present its defenses to the Prosecution Team's claims. These procedures do not afford Atlantic Richfield a meaningful opportunity to investigate all relevant facts related to the Sites and to present that information to the Board. The Hearing Procedures thus do not satisfy the federal or state constitutions' guarantees of due process. Nor could the Board ever satisfy due process in a prosecution involving these Sites given the Prosecution Team's failure to acknowledge in its case-in-chief the Board's own liability for the conditions at the Sites.

Atlantic Richfield therefore moves the Board for a ruling that the Board must recuse itself from ruling on the Draft CAOs.

BACKGROUND

The facts at issue in this case date from 1906 to 1941. That is the period of time when Walker Mining Company operated the Mine and Tailings Sites and the period of time during which the Prosecution Team claims that International Smelting & Refining Company ("IS&R") and Anaconda Copper Mining Company ("Anaconda") incurred the liability supposedly supporting the Draft CAOs. Under *United States v. Bestfoods*, which the Prosecution Team agrees supplies the governing standard, the Board must look at these hundred-year-old facts and evaluate whether IS&R or Anaconda directed pollution-causing activities at the Mine or Tailings Site. (Prosecution Team Opening Brief at p. 12 ("Under *Bestfoods*, operator liability occurs where the parent corporation operated the subsidiary's facility and directed the activities that caused the pollution.").) The *Bestfoods* standard thus incorporates a requirement that the Board determine in the first instance what pollution is occurring at the Sites and what activities caused that pollution, issues that require experts' scientific and technical examination. In sum, the alleged Dischargers, the Prosecution Team, and the Board not only must uncover and understand a one hundred-year-old historical record, but must also develop and distill a body of scientific facts related to the current environmental conditions at the Sites and the historical mining practices that could have caused those conditions.

Unsurprisingly, given the complicated nature of the facts and law at issue, Board staff has taken multiple years just to conduct the investigation on which the Prosecution Team now relies in attempting to justify the CAOs against Atlantic Richfield. In 1999,

the Board threatened enforcement against Atlantic Richfield upon these same facts, but elected not to proceed. (Exhibits 149-152.) The Board staff's more "recent" investigation of the Sites appears to have begun in at least 2010. (*See* Draft CAO R5-2014-YYYY at ¶ 35 ("[Board] staff recently obtained and reviewed relevant documents from the database and other sources."); Exhibit No. 157, Board email to Anaconda Collection dated Sept. 2010.) By contrast, Atlantic Richfield was able to begin preparing for the upcoming hearing only in October 2013 when (after a four month period of silence following Atlantic Richfield's June 3, 2013 comments on the original Draft CAOs), the Prosecution Team confirmed that it would go forward with the prosecution of this matter.

A final schedule for the hearing was not announced until January 27, 2014 when the Advisory Team rejected Atlantic Richfield's challenges to the Prosecution Team's proposed hearing procedures[1] and, instead, adopted the Prosecution Team's proposed deadlines: February 20, 2014 for presentation of Atlantic Richfield's evidence and legal arguments in written form, and March 27 or 28, 2014 for the hearing. The Hearing Procedures give Atlantic Richfield only 45 minutes to present evidence and argument to the Board. Despite Atlantic Richfield's requests, the Hearing Procedures lack any provision for formal discovery and deposition procedures, for expert disclosure procedures, or for separate argument of legal issues. Finally, Atlantic Richfield's request for bifurcation of the hearing on the CAOs was rejected. Bifurcation would have allowed the parties to develop and present evidence to the Board first as to liability and, only if necessary, as to the divisibility and proper apportionment of responsibilities for carrying out the CAOs. The Advisory Team did not articulate any reasons for rejecting Atlantic Richfield's requests.

ARGUMENT

I. The Hearing Procedures Violate Due Process By Denying Atlantic Richfield An Adequate Hearing.

The U.S. Supreme Court's decision in *Mathews v. Eldridge* determines the constitutional adequacy of proceedings that deprive a person of property. Under *Mathews*, courts analyze three factors to determine what process is due: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335 (1976); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1157-59 (9th Cir. 2013) (applying *Mathews* to overturn a U.S. Citizenship & Immigration Services decision). The Board's procedures in this case fail under the *Mathews* test and therefore violate due process.

[1] Atlantic Richfield's objections to hearing procedures are attached hereto as Exhibit 4023.

A. The Private Interest at Stake is Substantial.

If entered, the Draft CAOs would impose a substantial burden on Atlantic Richfield. The Draft CAOs contemplate a remediation project of unknown magnitude and cost occurring over multiple years on Sites covering more than 900 acres. The Board claims to have already spent $2.6 million at the Mine Site. Atlantic Richfield provided $2.5 million to the United States Forest Service (the "USFS") pursuant to the terms of the 2004 Consent Decree. What additional work Board staff contemplates for the Sites and the costs associated with that work are entirely unknown (the Board has provided Atlantic Richfield no opportunity to investigate the Sites beyond a single site visit).[2]

B. The Board's Procedures Pose a Great Risk for Error.

In *Mathews*, the Supreme Court recognized that the risk of error is greater in cases involving more complicated legal and factual questions. *See Mathews* (contrasting cases with "sharply focused and easily documented" facts to those where "a wide variety of information may be deemed relevant").[3] 424 U.S. at 343. Few substantive areas are more factually and legally complex than those in the environmental arena and, in particular, those where issues under *Bestfoods* arise. As detailed above, the Board's decision applying *Bestfoods* in this case will require it to consider facts that are more than a hundred years old, that involve historical mining practices, and that call upon the Board to understand multiple aspects of geology and modern environmental sciences. With only a few months for Atlantic Richfield to develop evidence in its defense and only 45 minutes for Atlantic Richfield to present that evidence to the Board, the risk of the Board erring is high.

The risk of error here is especially great because the Board denied Atlantic Richfield's request to bifurcate the hearing on the Draft CAOs to allow separate testimony and argument as to what, if any, apportioned share of liability Atlantic Richfield should bear. Under applicable law, Atlantic Richfield has a right to prove that any liability it has for the Sites is divisible from the shares of liability borne by other parties, including the Board itself and also USFS. (*See* Prehearing Motion No. 7.)

C. The Board has No Legitimate Interest in Such Minimal Procedures.

Having allowed the alleged pollution at the Sites to continue since at least 1958, having decided once already not to take enforcement action against Atlantic Richfield and, more recently, having spent more than three years investigating Atlantic Richfield, the Board has no legitimate argument for not allowing Atlantic Richfield additional time

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[2] Upon receiving notice that prosecution of the Draft CAOs would go forward in December 2013, Atlantic Richfield was able to visit the sites only one time. The Sites are located in a remote mountainous area that cannot be accessed during the winter, which can last as long as six months.

[3] In simple cases, less robust procedures may satisfy due process. *See, e.g., Machado v. State Water Resources Control Board*, 90 Cal. App. 4th 720 (Cal. App. 2001) (when there was only one potentially liable party, the ownership of that party was not in dispute, and there was an eye witness to the pollution at issue, a full hearing was unnecessary).

to prepare. Likewise, the Board has offered no explanation for giving Atlantic Richfield only 45 minutes to present its evidence and legal arguments at the hearing.

II. The Board Is Biased And May Not Constitutionally Adjudicate Any Claim Related To These Sites.

"[A] fair trial in a fair tribunal is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). This case requires the Board to determine whether to shift all or a portion of its own liability onto the Dischargers named in the Draft CAOs. While the Board will not likely consciously act on its bias, the chance of its bias unconsciously impacting its decision remains too great. When a tribunal's members have a financial interest in the outcome of a case, "experience teaches that the probability of actual bias on the part of the [tribunal] is too high to be constitutionally tolerable." *Id.* The financial interest need not be personal to the tribunal members; instead, a decision-maker's interest in maintaining the funds in a public account is sufficient to disqualify that person from serving as an adjudicator. *See Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972) (holding that a mayor could not be an impartial adjudicator where the revenue produced by fines in his court provided a "substantial portion of [the] municipality's funds"); *Esso v. Lopez*, 522 F.3d 136, 147 (1st Cir. 2008) (holding that the Puerto Rican Environmental Quality Board was not impartial where it sought to impose a fine that would be paid into an account it administered).

The risk of Board bias in considering the Draft CAOs is unconstitutionally high. The Prosecution Team has failed to acknowledge and fairly represent in its case-in-chief that the Board bears a substantial share of the liability for the Sites. The Board's liability arises not only from taking on the remediation of the Mine Site, but also from stepping into the shoes of former Mine Site owners by settling with, releasing, and holding harmless those parties. Indeed, according to its own documents, the Board staff has prepared the Draft CAOs with findings against Atlantic Richfield in the hopes of offloading its liability. The Board's own liability is too great for the Board to provide the constitutionally required fair tribunal.

CONCLUSION

Given the constitutional inadequacies of the Board's procedures in this case and the risk of Board bias in ruling on the Draft CAOs, Atlantic Richfield respectfully requests that the Board rule, as a matter of law, that the Board must recuse itself from ruling on the Draft CAOs.

Dated this 20th day of February, 2014.

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 5 REQUESTING A REGIONAL BOARD RULING THAT THE PROSECUTION TEAM'S CLAIM FOR CONTRIBUTION CANNOT BE ADJUDICATED IN AN ADMINISTRATIVE HEARING

INTRODUCTION

Neither federal law, nor the Water Code, countenances what the Prosecution Team is really asking the Regional Board (the "Board") to do in this case, *i.e.*, have the Board decide whom among several potentially liable parties, including the Board itself, is responsible for remediating the Sites. Only a contribution action can resolve such an issue and no contribution action may be brought as part of an administrative proceeding before the Board. Moreover, the federal court retained jurisdiction in the Consent Decree to which the United States Forest Service ("USFS") and Atlantic Richfield Company ("Atlantic Richfield") are parties and that Consent Decree protects Atlantic Richfield from contribution claims. Compelling Atlantic Richfield to enter onto USFS property would violate federal law and is beyond the Board's jurisdiction.

Atlantic Richfield therefore moves the Board for a ruling that the Board lacks jurisdiction to adjudicate a claim for contribution at the administrative hearing scheduled to consider the Draft Cleanup and Abatement Orders (the "Draft CAOs").

BACKGROUND

In exercising its delegated authority to select and implement the remedy for the Tailings Site, the USFS and Atlantic Richfield negotiated a consent decree, which the United States District Court approved on June 13, 2005. The Consent Decree includes a section labeled "Effect of Settlement; Contribution Protection" which adopted the parties' agreement that "...by entering th[e] Consent Decree. . . Settling Defendants are entitled . . . to protection from costs, damages, actions, or other claims (whether seeking contribution, indemnification, or however denominated) for matters addressed in th[e] Consent Decree as provided by (1) CERCLA Section 113(f)(2), and (2) any other applicable law." (Exhibit No. 155, Consent Decree at § IX.19 (emphasis added).) The Consent Decree went on to define "matters addressed" as "all Response Actions taken or to be taken and all Response Costs incurred or to be incurred by the United States or any other person with respect to the [Tailings] Site." (*Id.* (emphasis added).) The Consent Decree does not provide Atlantic Richfield any right to access the Tailings Site and, in fact, USFS specifically retained the right to sue Atlantic Richfield should it ever conduct any activity on the Tailings Site. (*See id.* at ¶ 13(4) General Reservation of Rights (liability for operation of the Site after signature of the Consent Decree).)

ARGUMENT

I. The Draft CAOs Are Actions For Contribution That The Board Cannot Adjudicate.

The Board is itself liable for abating the alleged nuisance conditions at the Sites. (*See* Prehearing Motion No. 2.) Thus the Draft CAOs are in fact and at law claims for contribution. "When one liable party sues another to recover its equitable share of the response costs, the action is one for contribution." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989). Although the Prosecution Team seeks to frame its

allegations as an enforcement action, the evident purpose of its claim is to re-allocate the costs for cleaning up the Sites; the Board has borne more liability than it thinks is equitable and now wishes to allocate to Atlantic Richfield costs for which the Board is itself liable.[1]

The Board's own internal documents are explicit in stating the Board's intent to use the CAOs as a means to shift the Board's liability onto Atlantic Richfield. In 2011, a Board staff member seeking his supervisors' approval for additional investigation of Atlantic Richfield's connection to the Sites wrote that "[i]f the [Board] is to reduce its liabilities for Walker Mine, it must determine if a responsible party exists." (Exhibit No. 158 (emphasis in original).) A Board memo from 2013 is even more to the point: "Please bear in mind that the [Board] potentially is a responsible party . . . and the sooner we bring [Atlantic Richfield] in as a RP the sooner we are relieved of that responsibility." (Exhibit No. 159 (emphasis added).[2])

Federal case law is clear that a plaintiff may not expand its rights by restyling a contribution claim as some other cause of action. In *United States v. Cannons Eng'g Corp.*, a U.S. Court of Appeal considered whether a plaintiff could bring an indemnity claim where CERCLA would bar a contribution claim. 899 F.2d 79 (1st Cir. 1990). The court held that the indemnity claim was "in effect only a more extreme form of a claim for contribution" and thus affirmed the indemnity claim's dismissal. *Id.* at 92; *see also United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1495-97 (S.D. Ohio 1991) (dismissing state law claims for indemnity, breach of express or implied contract, and various equitable doctrines including quasi-contract, quantum meruit, restitution and unjust enrichment because the claims were simply attempts to bring a contribution action under a different name).

So too, here, the Prosecution Team's Draft CAOs actually go even further than a contribution claim. The Board does not seek merely to allocate to Atlantic Richfield a share of the Board's liability for the Sites, but instead seeks to transfer all future liability for the Sites (and some past liability). In effect, the Board seeks to absolve itself of the obligations it accepted by undertaking remedial actions and settling with, releasing, and holding harmless responsible parties.

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[1] Pursuant to its Consent Decree with USFS, and without admitting any liability, Atlantic Richfield has already paid $2.5 million for response activities at the Sites.

[2] The referenced record was produced with other materials by the Regional Board in response to a CA Public Records Act Request served by Atlantic Richfield. The Prosecution Team later produced a privilege log through which the Prosecution claims this record is protected from disclosure, citing Deliberative Process (Cal. Gov. Code 6255); Active Litigation (Cal. Gov. Code 6254, subd. (b)); and attorney client and attorney work product privileges. Atlantic Richfield disagrees with the Prosecution's privilege claims, and the parties agreed to seek a ruling from the Advisory Board whether the subject record is privileged under one or all of the grounds asserted by the Prosecution.

A. The Board Lacks Jurisdiction to Adjudicate a Contribution Action for Either Site.

The California Water Code does provide for contribution actions in other circumstances – but the Board does not have jurisdiction to adjudicate such actions. To the contrary, Water Code Section 13350(i) provides that "[a] person who incurs any liability established under this section shall be entitled to contribution for that liability from a third party, *in an action in the superior court* . . . ." (Emphasis added.) Of course, even the Board itself must file in the superior court if it is seeking to recover its own past costs for remedial activities. (*See* Prehearing Motion No. 8.) Thus, the Water Code plainly expresses the legislature's intent to not give the Board jurisdiction over disputes about who among multiple liable parties, including the Board itself, will bear the costs of a remediation. The Board, like any other liable party, must bring such disputes either to the California Superior Court (under the Water Code) or to federal court (under CERCLA). Indeed, a system by which the Board could sit as the trier of fact and law in an action to shed its own liability onto another party would be unconstitutional on its face. (*See* Prehearing Motion No. 4.)

B. The USFS / Atlantic Richfield Consent Decree Bars the Draft CAO for the Tailings Site.

In June 2005, the U.S. District Court for the Eastern District of California approved the Consent Decree between USFS and Atlantic Richfield, including the provision stating: "The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants [*i.e.*, Atlantic Richfield] are entitled . . . to protection from costs, damages, actions, or other claims (whether seeking contribution, indemnification, or however denominated) for matters addressed in th[e] Consent Decree as provided by (1) CERCLA Section 113(f)(2), and (2) any other applicable law." (Exhibit No. 155, Consent Decree at § IX.19 (emphasis added).) Contrary to the Prosecution Team's contention, the Consent Decree's plain language expressly extends beyond CERCLA. As emphasized, Atlantic Richfield's contribution protection covers all "costs, damages, actions, or other claims . . . however denominated" under CERCLA or "any other applicable law." Further, in defining the "matters addressed" for purposes of contribution protection, the Consent Decree includes all remedial costs "incurred or to be incurred by the United States or any other person with respect to the [Tailings] Site." (*Id.* (emphasis added).) The Prosecution Team offers no explanation of how this language can be read as protecting Atlantic Richfield from only those claims filed under CERCLA. Nor does the Prosecution Team do anything to distinguish the cases cited above and holding that CERCLA contribution protection extends beyond suits pursuant to CERCLA. The Prosecution Team's claims against Atlantic Richfield for the Tailings Site are indistinguishable from these other state law claims and are therefore barred by the Consent Decree.

CONCLUSION

Because the Draft CAOs are, in fact and at law, contribution claims subject to the requirements of Water Code Section 13350(i), Atlantic Richfield respectfully requests a ruling from the Board that, as a matter of law, the Board has no jurisdiction to adjudicate the Prosecution Team's claim for contribution for either of the two Sites in an administrative hearing. Accordingly, the Draft CAOs must be withdrawn and this matter dismissed.

Dated this 20th day of February, 2014.

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CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY

ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 6 REQUESTING A REGIONAL BOARD RULING THAT THE PROSECUTION TEAM HAS THE BURDEN TO PROVE EACH ELEMENT OF ITS CASE SEEKING EACH PROPOSED CLEAN UP AND ABATEMENT ORDER BY A PREPONDERANCE OF THE EVIDENCE

Atlantic Richfield Company ("Atlantic Richfield") moves the California Regional Water Quality Control Board for the Central Valley Region (the "Board") for a ruling that the Prosecution Team bears the burden of proving each element of its case requesting the issuance of each proposed Clean-Up and Abatement Order ("CAO") (CAO No. R5-2014-XXXX and/or CAO No. R5-2014-YYYY) by a preponderance of the evidence.

There can be no doubt that the burden of proving each element of a case to warrant the issuance of each proposed CAO falls on the Prosecution Team. Administrative proceedings are civil in nature. *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 855 (1982) ("It has been generally recognized that administrative proceedings . . . are civil rather than criminal in nature." (citations omitted)). Thus, in administrative hearings, as in typical civil court proceedings, the party asserting a claim or a defense has the burden of proof. *McCoy v. Board of Retirement*, 183 Cal. App. 3d 1044, 1051 n.5 (1986) ("As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence."). *See also* Cal. Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (emphasis added)).

In civil cases, the burden of proof is preponderance of the evidence unless otherwise provided by law. Cal. Evid. Code § 115 ("Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."); *Ettinger*, 135 Cal. App. 3d at 855 ("Generally, proof in civil cases is required by a preponderance of the evidence. However, in a number of situations, a greater degree of proof, usually clear and convincing evidence, is required.").

Thus, the default standard of proof used in administrative proceedings is a preponderance of the evidence. *See* Cal. Admin. Hearing Practice § 7.51 (citing Cal. Evid. Code § 115 and numerous cases). Indeed, the State Water Resources Control Board (the "State Board") has acknowledged that preponderance of the evidence is the default standard of proof. *See Rock Creek Hydroelectric Project Permitted Applications 26380 and 27353*, State Water Resources Control Board Order Amending Water Right Permits 19259 and 19260, WR 87-2 at 25 (1987) (observing that "[g]enerally, the proper standard of proof in cases where no fundamental vested right is involved is the preponderance of the evidence standard," before concluding the preponderance of the evidence standard applies to changes in water rights permits and rejecting permittee's contention that the proper standard is "clear and convincing proof to a reasonable certainty").

The Prosecution Team's contrary assertion is plainly wrong. In its Opening Brief, the Prosecution Team asserts that:

> "Board Actions must be supported by substantial evidence. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.) A party asserting something in the affirmative has the burden of proving the affirmative matter with substantial evidence. (See, e.g., Evidence Code § 115, *Topanga Assn.*, at 521 [party seeking variance has burden of proving entitlement to variance].) Substantial evidence "means credible and reasonable evidence" (*In re: Sanmina Corp.*, State Water Resources Control Board Order No. WQ 93-14)."

Prosecution Team's Opening Brief and Response to Dischargers' 3 June 2013 Comments on Draft CAOs ("Pros. Open. Br.") at 1-2.

None of the afore-cited authorities establishes that the Prosecution Team's position is correct. To the contrary, these authorities support, or are consistent with, Atlantic Richfield's position that the proper burden of proof at a hearing seeking to impose either CAO No. R5-2014-XXXX or CAO No. R5-2014-YYYY is a preponderance of the evidence. For example, the Prosecution Team replies upon *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974). *Topanga Ass'n* is a land use case regarding administrative mandamus review of a county's grant of a variance. The case holds that the agency granting the variance must make certain findings to enable review, and further holds that "a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision." 11 Cal. 3d at 514 (emphasis added). Consequently, *Topanga Ass'n*, at most, describes the standard for a court to examine another body's findings of fact upon review. *Topanga Ass'n* does not address the burden of proof at the hearing (or trial) level such as that involving the Board here.

The Prosecution Team then turns to Cal. Evid. Code § 115, which is odd, as this provision plainly undercuts its view in deference to Atlantic Richfield's position:

> "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. *Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.*" (Emphasis added).

Finally, the Prosecution Team refers this Board to *In re Sanmina Corp.*, State Water Resources Control Board Order No. WQ 93-14. The Team cites the Order for the meaning of substantial evidence. Beyond that, the Order, at most, represents the position that the State Board applies the substantial evidence standard as the reviewing (or appellate) body examining a Board decision. This is not the issue at this juncture.

If the Prosecution Team were correct that its burden of proof before the Board were merely to produce "substantial evidence" to support each element of each

proposed CAO, it could theoretically induce this Board to rule against a respondent that had far greater evidence – in fact a preponderance of the evidence – as to one or even all of the essential elements necessary to warrant the issuance of either or both CAOs. In other words, the Prosecution Team would ask the Board to find that a finding of fact should be made even though the preponderance of the evidence demonstrated to the contrary. This would be illogical, unfair and an obvious deprivation of due process.

The Board should grant this motion as a matter of law.

Dated this 20th day of February, 2014.

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CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY

ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 7 REQUESTING A REGIONAL BOARD RULING THAT ATLANTIC RICHFIELD CANNOT BE JOINTLY AND SEVERALLY LIABLE FOR CLEAN UP AND ABATEMENT OF THE MINE AND/OR MINE TAILINGS SITES

INTRODUCTION

The Prosecution Team contends that Atlantic Richfield Company ("Atlantic Richfield") is liable for conditions at the Sites because Anaconda Copper Mining Company ("Anaconda") and International Smelting & Refining Company ("IS&R") allegedly directed specific pollution-causing activities there. The Prosecution Team does not dispute that Anaconda and IS&R at all times were separate corporate entities from the Walker Mining Company and that corporate formalities were followed. In sum, the Prosecution Team does not seek a ruling from the Regional Board (the "Board") upon an alter-ego theory of liability against Atlantic Richfield. Even if the Board were to find Atlantic Richfield liable – a finding which Atlantic Richfield believes is not supported by the evidence – then Atlantic Richfield's liability extends only to the quantum of harm that may arise from the pollution-causing activities in which the Board finds that Anaconda and IS&R were involved. In other words, liability under Water Code Section 13304 and *United States v. Bestfoods* is several only, not joint and several. Moreover, even if joint and several liability were the rule here, traditional tort law principles and multiple environmental statutes show that Atlantic Richfield should have the opportunity to prove that the harm at issue is reasonably capable of apportionment. Because the harm from Walker Mining Company's mining operations as a whole *is* reasonably capable of apportionment, any finding of liability against Atlantic Richfield would have to be apportioned among Atlantic Richfield and other liable parties.

Atlantic Richfield therefore moves the Board for a ruling that liability under Water Code § 13304 is several only or, in the alternative, even if liability were joint and several, the Board would have to apportion responsibility for conditions at the Sites among Atlantic Richfield, the Board itself, and all other liable parties.

ARGUMENT

I. Water Code Section 13304 Liability Is Several Only.

Water Code Section 13304's plain language establishes that liability is several only. In relevant part, Water Code Section13304 provides that,

> Any person . . . who has caused or permitted . . . any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

Cal. Water Code §13304(a) (emphasis added).

Thus, Section 13304 refers specifically to "the waste" a discharger has "caused or permitted." Section 13304 does not provide that a discharger shall be liable for

cleaning up all waste or abating the effects of all waste. *See id.* Imposing joint and several liability therefore would be inappropriate under Water Code Section 13304.

Section 13304's plain language comports with the *United States v. Bestfoods* legal standard the Prosecution Team identified as governing this case. "Under *Bestfoods*, operator liability occurs where" a corporate shareholder "operated the [corporation's] facility and directed the activities that caused the pollution." (Prosecution Team Opening Brief ("Pros. Op. Br.") at p. 12.) As with the Water Code, direct operator liability pursuant to *Bestfoods* is limited in scope to the harm arising from the particular activities the shareholder caused. The reason for this is that a direct operator liability finding under *Bestfoods* does not mean the shareholder stepped into the shoes of the corporation; to the contrary, a direct operator liability finding recognizes that the shareholder is liable only because of, and only to the extent of, specific pollution-causing activities in which the shareholder participated.

The Prosecution Team ignores Section 13304's plain language, instead claiming that the legislative "intent" behind the provision is for any clean-up and abatement liability to be joint and several. It is telling that the Prosecution Team completely fails to cite any portion of the legislative history of this supposed intent. (Pros. Op. Br. at p. 20.) Indeed, to support joint and several liability, the Prosecution Team cites a single sentence from a decision by the State Water Resources Control Board (the "State Board"), *In the Matter of Union Oil Company of California*, Order No. WQ 90-2. (*See* Pros. Op. Br. at p. 20.) That decision contains only the State Board's 1990 passing observation that liability should be joint and several under Section 13304. *See* Order No. WQ 90-2 at 4. Twenty-four years ago, the then-sitting members of the State Board presented this observation without a single citation to the statutory language, the legislative history or any precedential court opinion. *See id.* Moreover, the arguments and authorities that Atlantic Richfield presents here were not before that *Union Oil* State Board. Furthermore, that Board did not decide the issues raised in Union Oil's petition, but remanded the matter to the Board to issue either a consolidated order or a coordinated order to the various alleged dischargers, rather than proceed in a piecemeal manner. *See* Order No. WQ 90-2 at 4. Consequently, the *Union Oil* order can hardly be dispositive, or even relevant, to determining the Water Code's application to this case.

II. Joint and Several Liability Is Inappropriate When The Harm At Issue Is Reasonably Capable of Apportionment.

Even in contexts where joint and several liability is sometimes appropriate, both traditional tort law and modern environmental law provide a defense where the harm is reasonably capable of apportionment.

Under traditional tort law regarding joint and several liability:

> Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> And
>
> If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, *each is subject to liability only for the portion of the total harm that he has himself caused.*

Restatement (Second) of Torts §§ 433A, 481 (emphasis added).

The United States Supreme Court incorporated these Restatement sections in its interpretation of CERCLA. The Court observed that "Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law.'" *Burlington Northern & Santa Fe Ry. v. United States,* 556 U.S. 599, 613-15, 619 (2009), quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (1983); *see also id.* at 614 ("'[T]he universal starting point for divisibility of harm analyses in CERCLA cases' is § 433A of the Restatement (Second) of Torts."), quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001). The Prosecution Team has offered no reason to think the California legislature intended to depart from these common law principles in crafting the Water Code.

Indeed, in drafting California's state law equivalent to CERCLA, the legislature specifically included the reasonable apportionment defense to joint and several liability. California Health & Safety Code Section 25363(a), the Hazardous Substance Account Act ("HSAA"), states that:

> Except as provided in subdivision (f), any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion.

Cal. Health & Safety Code § 25363(a).

The Prosecution Team appears to concede that the Board may apportion liability, but contends that apportionment is discretionary. (*See* Pros. Op. Br. at p. 20 & n.12.) The Prosecution Team is simply wrong on the law. For the Board to deny Atlantic Richfield a defense despite Atlantic Richfield's ability to prove reasonable apportionment would be a departure from both common law and modern environmental law.

III. The Harm At Issue Here Is Reasonably Capable of Apportionment.

There is a reasonable basis for apportionment in this case, which inquiry is fact-specific to a particular case. Courts look to various factors and rely on estimates in determining whether harm is reasonably capable of apportionment. For example, in *Burlington Northern*, the Supreme Court recognized that "divisibility may be established by 'volumetric, chronological, or other types of evidence,' including appropriate geographic considerations." 556 U.S. at 617-18 (citation and internal quotation marks omitted). The Supreme Court held that the trial court's allocation of liability was supported by evidence that comported with general principles of apportionment, even though the evidence presented to the trial court by the parties might not permit precise calculation of the defendant's particular contribution to the contamination. *Id.* at 617-19. In so holding, the Supreme Court recognized that apportionment does not require "specific and detailed records" or precise figures demonstrating a particular defendant's contribution to the contamination. *Id.* at 617-18.

Here, the factors identified in *Burlington Northern* and the *Bestfoods* liability standard provide a reasonable basis for apportionment. The evidence shows the limited duration of IS&R's and Anaconda's connection to the Sites, the narrow scope of IS&R's and Anaconda's activities and lack of involvement in pollution-causing activities, and IS&R's and Anaconda's remote potential for contributing to any discharge.[1]

There is a temporal basis for apportionment:

1. During the 107-plus years since the Walker Mining Company began operating the mine and appurtenant facilities, Atlantic Richfield itself has had absolutely no ownership, control, or other involvement, with either the Mine Site or the Mine Tailings Site beyond its participation as a party to the consent decree with the United States Forest Service in 2005.

2. IS&R had no ownership or control over either Site. It acted as a shareholder, at one point holding 51% of the shares, of Walker Mining Company, as a publicly-traded corporation.

3. Walker Mining Company operated the mine and mine property from 1906 to 1941.

4. However, IS&R was not a shareholder of Walker Mining Company until 1918. Therefore, IS&R was the shareholder of the publicly-traded Walker Mining Company for 26 years during which Walker Mining Company operated the mine.

5. Neither Walker Mining Company, nor anyone else, operated the mine for significant portions of the 1916-1945 period (1932-1935, June 1, 1938 to October 31,

[1] Based on all these factors, Atlantic Richfield has provided in its Prehearing Brief an estimate of the amount of harm reasonably apportionable to Atlantic Richfield compared to the amounts apportionable to other parties.

1938, and 1941-1945). The mine operated on a curtailed basis from January 1, 1938 to May 31, 1938. Thus the mine was silent for 8 of the 28 years Walker Mining Company operated the Mine and curtailed for roughly a half year during the 28 years. Walker Mining Company operated the mine while IS&R held stock. The 28-year operational period should thus be adjusted to 19 ½ years.

6. From 1945-2014, various other parties caused and/or contributed to the contamination at issue. These parties include –

a. Subsequent property owners and operators such as Robert Barry, Calicopia Corporation, Cedar Point Properties, Daniel Kennedy, AMAX, Inc., Sierra Mineral Management, Conoco, and Noranda Exploration; and

b. The Board itself—both indirectly, based on the Board having stepped into the shoes of other responsible parties pursuant to settlement/indemnification agreements, and directly, as a site operator for releases attributable to insufficient response actions the Board implemented at the Walker Mine Site.

There is also a basis for apportionment based upon the nature of the parties' activities at a given site.

1. IS&R, at most, might theoretically be liable for any action that meets *Bestfoods* criteria relating to its direct participation in Walker Mining Company's waste handling and disposal activities (if any). *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998). This issue is discussed in depth in Atlantic Richfield's Prehearing Brief. *See* Atlantic Richfield's Prehearing Brief at pp. 30-32.

2. Walker Mining Company is and other mine owners and operators could be liable for their respective activities in owning, operating and disposing of waste at the Mine and Mine Tailings Sites.

Despite the potential temporal allocation and nature of activity allocation evidence, the Prosecution Team appears to argue that apportionment is not available here because there are no "equitable reasons" for either type of allocation here. (Pros. Op. Br. at p. 20 n.12.) The Prosecution Team seems to add that, in any event, "Atlantic Richfield is the only remaining responsible party at the Mine." (*Id.* at 20.) As detailed in Atlantic Richfield's Prehearing Motion No. 2, the Prosecution Team is simply incorrect in asserting that Atlantic Richfield is the only remaining viable party with a relationship to the Sites. In any event, however, the Prosecution Team's equitable argument to expand Atlantic Richfield's liability in the absence of another deep pocket simply cannot override the applicable law and relevant evidence.

CONCLUSION

Based on Water Code Section 13304's plain language and other analogous laws, Atlantic Richfield respectfully requests a ruling from the Board that, as a matter of law, any liability the Board imposes for the Draft CAOs must be several only. Alternatively, any ruling made by the Board that liability under Water Code Section 13304 is joint and several must also allow apportionment, as a matter of law, because the harm is reasonably capable of apportionment.

Dated this 20th day of February, 2014.

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CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

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UNITED STATES DEPARTMENT OF AGRICULTURE,
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WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY

ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 8 REQUESTING A REGIONAL BOARD RULING THAT PAST COSTS ARE NOT RECOVERABLE IN THIS PROCEEDING

Atlantic Richfield Company ("Atlantic Richfield") moves the California Regional Water Quality Control Board for the Central Valley Region (the "Board") for a ruling that the Board's past costs are not recoverable in this administrative proceeding requesting the issuance of two proposed Clean-Up and Abatement Orders ("CAOs").

Draft CAO R5-2014-YYYY ("Mine CAO") improperly seeks to impose on Atlantic Richfield liability for past costs incurred by the Board in attempting to remediate the Mine site.[1] In relevant part, the proposed Mine CAO reads:

> The Discharger shall reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation and remediation of the mine, **including the Central Valley Water Board's previous expenditures for remedial actions**, pursuant to Water Code section 13304, subdivision (c)(1).

Mine CAO at p. 11, ¶ 5 (emphasis added).

Mandating payment of the Central Valley Water Board's past costs is plainly impermissible under the express terms of Water Code Section 13304(c)(1). As the Prosecution Team concedes, the plain language of Water Code Section 13304(c)(1) provides only that past costs are recoverable in a civil action. (Prosecution Team's Opening Brief ("Pros. Open. Br.") at 19.) Yet the Prosecution Team asserts, without any citation to authority or reasoned argument, that past costs are also recoverable through a CAO. (*See id.* at 19-20.) The Prosecution Team is wrong.

Water Code Section 13304(c)(1) provides:

> If the waste is cleaned up or the effects of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by any governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that governmental agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action. **The amount of the costs is recoverable in a civil action** by, and paid to, the governmental agency and the state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available fund. (Emphasis added.)

[1] The Regional Board does not appear to be seeking to recover any past costs it may have incurred with respect to the Tailings site. *See* CAO No. R5-2014-XXXX ("Tailings CAO") at p. 9, ¶ 5.

As this quote shows, Water Code Section 13304(c)(1) explicitly specifies how the Board may recover its past costs, and provides only one option: "a civil action." Thus, civil actions are the exclusive method by which the Board may recover its past costs.

Other provisions of Water Code Section 13304 further demonstrate that subdivision (c)(1) does not permit recovery of past costs through a CAO. For example, subdivision (b)(4) provides that:

> The regional board may contract with a water agency to perform, under the direction of the regional board, investigations of existing or threatened groundwater pollution or nuisance. The agency's cost of performing the contracted services shall be reimbursed by the regional board from the first available funds **obtained from cost recovery actions** for the specific site.

Water Code § 13304(b)(4) (emphasis added). This language makes it even clearer that the Legislature intended that any recovery of past costs would be obtained via a separate civil action, not a CAO.

Given the clear terms of Section 13304, the Prosecution Team's bare assertion that the Board's past costs are recoverable through the draft Mine CAO is simply wrong. Atlantic Richfield is not aware of a single decision holding that past costs are recoverable in an administrative proceeding like that here. And the Prosecution Team itself has provided no authority or argument to support its claim. (*See* Pros. Open. Br. at 19-20.) Accordingly, the Board must disregard the Prosecution Team's argument.

In addition, the Board cannot recover past costs from Atlantic Richfield because it has not proven they are "reasonable" and "actually incurred." Under Water Code Section 13304(c)(1), before a government agency can recover any of its past costs for cleanup and abatement actions under Section 13304, it must prove that those costs are "reasonable" and "actually incurred." Here, the Prosecution Team has not presented <u>any</u> documentation for its past costs, let alone demonstrated that they are "reasonable."

For each of these reasons, the Board should grant this motion as a matter of law.

Dated this 20th day of February, 2014.

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UNITED STATES DEPARTMENT OF AGRICULTURE,
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WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 9 REQUESTING A REGIONAL BOARD RULING THAT CERTAIN OPINIONS OF DR. FREDRIC QUIVIK ARE EXCLUDED AND STRICKEN FROM THE RECORD

Atlantic Richfield Company ("Atlantic Richfield") moves the California Regional Water Quality Control Board for the Central Valley Region (the "Board") for a ruling that certain testimony of the Prosecution Team's expert, Dr. Fredric Quivik, must be excluded and stricken from the record. Atlantic Richfield does not object to the majority of Dr. Quivik's report.[1] Rather, this Motion is a focused challenge to certain of Dr. Quivik's opinions that are predicated on speculation and irrelevant matters.

ARGUMENT

The Board must exclude from this proceeding any expert testimony that fails to meet the requirements of California Evidence Code sections 801 and 802. Under California Code of Regulations Title 23, Section 648(b), California Evidence Code sections 801-805 govern the admissibility of expert opinion in this proceeding. Under Evidence Code sections 801 and 802, the Board, as the adjudicative body, "acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." *Sargon Enterprises, Inc. v. Univ. of Southern California*, 55 Cal.4th 747, 771-72 (2012).

As the California Supreme Court has explained, "irrelevant or speculative matters are not a proper basis for an expert's opinion" and must be excluded. *Id.* at 770 (citation and quotation marks omitted). Evidence Code section 801(b) requires that experts only rely on matters that may "reasonably be relied upon" in "forming opinions on the subject." Under this provision, the court or administrative hearing body "must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." *Sargon Enterprises, Inc.*, 55 Cal.4th at 772. This is because,

> "The chief value of an expert's testimony . . . rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion; . . . it does not lie in his mere expression of conclusion. . . . In short, [e]xpert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions."

People v. Lawley, 27 Cal. 4th 102, 132 (2002) (emphasis in original; additional internal quotation marks omitted) (quoting *People v. Bassett*, 69 Cal. 2d 122, 141 (1968)).

In addition, an expert opinion that is purely conclusory is without evidentiary value. *Jennings v. Palomar Pomerado Health Systems, Inc.*, 114 Cal. App. 4th 1108, 1117 (2003).

Expert opinions that fail to meet these requirements should be excluded under Evidence Code section 803. Cal. Evid. Code § 803; *see also In Re Lockheed Litigation Cases*, 115 Cal. App. 4th 558, 564 (2004) (experts "must provide a reasonable basis for

[1] Although Atlantic Richfield is not objecting to the admissibility of all of Dr. Quivik's opinions, Atlantic Richfield does not concede that Dr. Quivik's other opinions are entitled to any weight.

the particular opinion offered"; "an expert opinion based on speculation or conjecture is inadmissible").

As described below, certain of Dr. Quivik's opinions fail to meet these predicates for admissibility; ultimately they mislead the trier of fact, rather than assist, because they lack a sound basis in logic and fact.

Opinions derived from unrelated cases. Dr. Quivik's opinions about Walker Mining Company's relationship with Anaconda / IS&R are admittedly derived from what he has observed in unrelated cases in which he has worked as an expert witness. (*See, e.g.*, Quivik Expert Report at p. 8, Paragraph E.) Such opinions are wholly irrelevant and speculative, and therefore these opinions should be excluded and stricken from the record.

None of Dr. Quivik's observations in these unrelated cases are at all relevant to this case. First, none of the unrelated cases involved the issue of the relationship between Anaconda (or IS&R) and the Walker Mining Company. Second, there is absolutely no overlap between the companies at issue here (Anaconda, IS&R, and Walker Mining Company), and the companies whose relationship was at issue in the main case Dr. Quivik relies on, *United States v. Newmont*. (*See* Quivik Expert Report at pp. 15, 17, and 22.) Dr. Quivik's opinion in *Newmont* related to the relationship between Newmont Mining Corporation and Dawn Mining Company, LLC in the 1950s and 1960s with respect to a mine in Montana—different parties, different time, different mine (among myriad other differences). *See* Conclusions of Law and Findings of Fact, *United States v. Newmont USA Ltd.*, No. CV-05-020 (E.D. Wash. Oct. 17, 2008). Thus, Dr. Quivik must be prohibited from offering testimony about *Newmont*, and any opinions based on his observations in that case should be excluded and stricken from the record.

Because cases involving different parties and different sites are irrelevant to the relationship between Anaconda / IS&R and the Walker Mining Company, it is pure speculation to assume as Dr. Quivik does, that what happened in these unrelated cases also happened here. For example, Dr. Quivik asserts that one of the most compelling sources he relied on to understand the "exact nature of the management relationship between the Walker mine and the Anaconda / IS&R organization" is a 1920 newspaper article that states "'[t]he Anaconda company is under contract with the Walker Copper people to operate the mine for the best interest of the Walker Copper.'" (Quivik Expert Report at p. 15 (quoting a 1920 article from the *Salt Lake Mining Review*).) Based on this newspaper article, Dr. Quivik appears to conclude there was a contract between the two companies. (*See id.* at p. 15-16.) Dr. Quivik admits he "has not seen a contract between Anaconda and the Walker Mining Company," and yet he inexplicably assumes that the contract would have been just like a contract he saw in another case in which he was an expert (*Newmont*). (*See id.*) Conveniently, the contract in that case gave "Newmont the means to participate directly in the management of Dawn's operations." (*Id.* at p. 15.)

Such speculation is improper: "an expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed

facts exist *in the case before the [factfinder]*, does not provide assistance to the [factfinder] because the [factfinder] is charged with determining what occurred in the case before it, not hypothetical possibilities." *Jennings*, 114 Cal. App. 4th at 1117 (emphasis added). In sum, to assume that what happened in an unrelated case probably also happened in this case is an error of reasoning that fails to meet the requirements for expert opinions.[2]

For each of these reasons, Dr. Quivik's opinions based on his observations in unrelated cases must be excluded and stricken from the record. This includes opinion E on page 8 of Dr. Quivik's report and the discussion on pages 18 – 25 of his report.

Opinions based on speculation. Dr. Quivik's opinions that Anaconda / IS&R "directed the operations" of Walker Mine in general and "managed the Walker mine concurrently with the Walker Mining Company" (Quivik Expert Report at pp. 47 and 8, Paragraph F), are based on conjecture and thus should be excluded and stricken from the record.

Dr. Quivik's report cites in support of his opinions documents from the Anaconda Collection related to the Walker Mine and the Walker Mining Company. Rather than simply report what these documents state, however, Dr. Quivik interprets them. And although Dr. Quivik has no first-hand experience with mining, he "interprets" the documents to conclude that Anaconda / IS&R directed the areas of "geology, mining, and metallurgy" at the mine.[3]

It is the next step in Dr. Quivik's analysis, however, that is most objectionable and must be stricken in its entirety under California law. After making conclusions about Anaconda / IS&R's involvement with geology, mining and metallurgy, Dr. Quivik makes the giant and completely unexplained leap that Anaconda / IS&R was involved in *all* aspects of the mine and in fact "managed the Walker mine concurrently with the Walker Mining Company from 1918 to 1941." (*See* Quivik Expert Report at 8, Paragraph F.) Dr. Quivik provides no rationale for equating involvement in *some* aspects of the mine to involvement in *all* aspects of the mine. Nor does Dr. Quivik explain how he arrived at the striking conclusion that Anaconda / IS&R "managed" the mine when he also concluded that "[t]he overall plan for exploration, development, and mining at the Walker mine was being overseen by the ACM's top officials, ..." (Quivik Expert Report at p. 30 (emphasis added).) Dr. Quivik's own language ("overseen") suggests there is a gap between the evidence and his ultimate opinion ("managed"): even assuming for the

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[2] Dr. Quivik himself admits that it is improper to rely upon evidence from other mining companies or even from secondary sources. He claims that his "historical method" is based on review of primary documents involving the relevant companies—not primary documents involving *other* companies. (*See* Quivik Expert Report at p. 7; *see also id.* at p. 2-3 (explaining "the historical method," which he describes as a method for creating "a coherent and verifiable narrative recitation of the past").)

[3] In contrast, Atlantic Richfield's expert, Dr. McNulty, has extensive first-hand expertise with mining and can help translate the technical terms contained in the historical records to explain what type of work was involved. Dr. McNulty explains in his report that the Anaconda Companies were mostly involved with exploration and development of ore reserves; in other words, prospecting, finding and quantifying ore reserves for future mining.

sake of argument that Company A "oversees" Company B's plan for exploration and development, it does not mean that Company A actually "manages" the implementation of the plan much less that it "manages" Company B in general.

The unexplained and unsubstantiated conclusion that Anaconda / IS&R actually managed the entire Walker Mine, and for the entire duration of their investment in the mine, is even more suspect because Dr. Quivik makes this leap based on a partial record of events that occurred between 100 and 65 years ago, and because Dr. Quivik makes no attempt to account for contemporaneous findings that Anaconda / IS&R did *not* control the Walker Mining Company.

After an eight-day hearing in the 1945 bankruptcy proceeding of Walker Mining Company, when witnesses who had relevant first-hand personal knowledge were still available to testify and more documentary evidence would have been available, the U.S. Bankruptcy Court held that no act or omission of Anaconda / IS&R "established by any evidence, constitutes or proves any domination or control by them of any of them over Debtor or any of Debtor's acts, business or affairs. . . ." (Exhibit No. 131.) Dr. Quivik does not attempt to explain this contradictory finding; nor can he.

Because Dr. Quivik's conclusion that Anaconda / IS&R "managed the Walker mine" is unexplained and unsubstantiated, it does not meet the threshold requirements of Evidence Code sections 801 and 802, and therefore must be excluded. *See Jennings*, 114 Cal. App. 4th at 1117.

CONCLUSION

For the foregoing reasons, Atlantic Richfield requests a ruling from the Board that, as a matter of law, Dr. Quivik's conclusions based on other cases and other mining companies (including opinion Paragraph E on page 8 and pages 18-25) and his conclusion that Anaconda or IS&R "managed the Walker mine" (including opinion Paragraph F on page 8) are excluded and stricken from the record.

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